THE HONORABLE JOHN E. BRIDGES

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CHELAN COUNTY

Timothy Borders et al.,

Petitioners,

v.

King County et al.,

Respondents,

and

Washington State Democratic Central Committee,

Intervenor-Respondent.

NO. 05-2-00027-3

WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE'S [PROPOSED] SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

CONTENTS

I.	FINI	FINDINGS OF FACT			
	A.	Petitioners' Claims Regarding Provisional Ballots and Polling Place Discrepancies	1		
	B.	Petitioners' Claims Regarding Absentee Crediting	8		
	C.	Findings Regarding Expert Testimony and the Application of Proportionate Deduction	11		
П	CON	ICLUSIONS OF LAW	13		

I. FINDINGS OF FACT

Intervenor-Respondent WSDCC ("WSDCC") supplements its proposed findings in three areas and updates its proposed conclusions of law. If the Court would find helpful a more complete set of findings and conclusions, Respondent can provide such on short notice.

A. Petitioners' Claims Regarding Provisional Ballots and Polling Place Discrepancies

- 1. A provisional ballot must be issued to any person whose name does not appear in the poll book. RCW 29A.04.008(5); WAC 434-253-043. Under federal law, every county in the state is required to provide voters a real opportunity to vote by provisional ballot even if they are not shown to be a registered voter in the poll book in a polling place. 42 U.S.C. § 15301.
- 2. Although the State of Washington had experience with "special ballots," the use of provisional ballots in the 2004 general election exceeded both historical levels and the expectation of election workers in many counties. *See* WAC 434-253-043 to -049 (2002) (amended 2004).
- 3. Provisional ballot voters sometimes cast the provisional ballots directly into the tabulating machine or ballot box rather than returning it to the poll worker for placement into the two envelopes (security and verification) that precinct election officials transmit to the auditor for verification of the voter's registration status and signature before the ballots are counted. WAC 434-253-043; WAC 434-253-047; *see also* WAC 434-253-045 (listing information required on outer envelope, including voter's name, signature, and date of birth among other information). In many counties, such as Adams, Benton, King, Kittitas, Stevens, and Walla Walla, provisional ballots are indistinguishable from regular polling

place ballots. King County poll workers were instructed to crease the ballot to try to avoid inadvertent casting of the ballot by voters. Tr. Vol. 2, 420:16-426:23 (Testimony of Bill Huennekens). Chelan County and some others print provisional ballots on different colored paper or make them distinguishable from other poll ballots in other ways. In counties using poll boxes, different color ballots may allow election officials to distinguish provisional ballots that have been dropped directly into the ballot box from other poll ballots.

- 4. It was not illegal during the 2004 election for counties to use the same ballots for provisional and poll voters.¹ Even if, with the benefit of hindsight, the Court disagrees with the judgment of King and other counties that using different provisional ballots was too complicated and might have unintended and unfortunate consequences (as the switch to the newest DIMS software shows), that difference in judgment does not render their conduct illegal or legally erroneous. *See* Testimony of Greg Kimsey, Clark County Auditor (Tr. Vol. 5, 1073:4-8); Dean Logan, Director of Records and Elections, King County (Tr. Vol. 7, 1416:10-23, 1486:14-1487:9); Bob Terwilliger, Snohomish County Auditor (Tr. Vol. 6, 1343:8-15).
- 5. In at least eleven counties, election officials inadvertently allowed "misfed" provisional ballots to be counted before verification was completed or failed to verify signatures before counting provisional ballots that were properly returned in their envelopes.

¹ The law at the time of the 2004 general election did not require provisional ballots to be distinguishable from any other ballots, but the Legislature recently enacted a new section to RCW 29A.36 that requires provisional ballots and absentee ballots to be visually distinguishable from each other and to be "either: (1) Printed on color paper; or (2) Imprinted with a bar code for the purpose of identifying the ballot as a provisional or absentee ballot." 59th Leg., 2005 Reg. Sess., Act of May 3, 2005, ch. 243, 2005 Wash. Legis. Serv. Ch. 243. The Legislature also changed the law to require that "[p]rovisional and absentee ballots must be incapable of being tabulated by poll-site counting devices." *Id.*

- 6. Based upon the work of the canvassing team, King County concluded that 348 provisional ballots likely were placed directly into the poll site tabulators. Tr. Vol. 2, 354:4-5 (Testimony of Bill Huennekens). Of these 348 ballots, King County determined that 252 were cast by properly registered voters who had not otherwise cast a ballot in the election.
- 7. In addition to misfed provisional ballots, some counties failed to do the required comparison on the signature on the provisional ballot envelope with the signature on the voter's registration. This was election official error. The individuals who cast unvalidated provisional ballots or misfed provisional ballots in these other counties are identified on Exhibit A attached hereto. The counties are:

Adams County. Tr. Vol. 5, 1158:11-1160:3, 1163:5-16 (as a matter of policy, did not check signatures on provisional ballots prior to counting) (Testimony of Nancy McBroom, Adams County Auditor); TX 7772; TX 7925.

Benton County. Tr. Vol. 5, 1178:22-1179:16 (Testimony of Brenda Chilton, Benton County Chief Deputy Auditor); TX 7926, 7980, 7981.

Clark County. Tr. Vol. 5, 1074:10-20, 1085:9-18 (Testimony of Greg Kimsey, Clark County Auditor).

Cowlitz County. Tr. Vol. 5, 1140:13-1141:10 (Testimony of Kristina Swanson, Cowlitz County Auditor); TX 7780, 7785.

Island County. Tr. Vol. 5, 1113:24-1114:6, 1119:13-15 (Testimony of Anne LaCour, Island County Chief Deputy Auditor); TX 7789.

Kittitas County. Tr. Vol. 5, 1090:8-1091:18, 1092:3-8, 1093:3-13, 22-25,

1094:7-1095:9, 1096:20-1097:4 (Testimony of Sue Higginbotham, Kittitas County Deputy Administrator); TX 7799, 7979, 7800.

Pierce County. Joint Designation of the CR 30(b)(6) Deposition of Pierce County at 12:19-13:21, 92:15-93:10, 94:12-95:15; TX 7932, 8047.

Spokane County. Tr. Vol. 5, 1102:19-1103:5, 1104:20-1105:8 (Testimony of Vicky Dalton, Spokane County Auditor); TX 7818.

Stevens County. Tr. Vol. 5, 1123:20-1124:3, 1127:16-1129:12, 1129:13-1131:4 (as a matter of policy, did not check signatures on provisional ballots prior to counting) (Testimony of Tim Gray, Stevens County Auditor); TX 7826, 7827.

Walla Walla County. Tr. Vol. 5, 1146:7-9, 1147:1-5 (as a matter of policy, did not check signatures on provisional ballots prior to counting), 1154:6-1155:3 (Testimony of Karen Martin, Walla Walla County Auditor); TX 7831, 7936.

- 8. Even if it was election official error that caused misfed provisional ballots to be cast directly at the polling place, the Court is neither inclined nor authorized to disenfranchise qualified, registered voters in these circumstances. As the Walla Walla County Auditor testified, there is no reason to disqualify a qualified, registered voter who had not otherwise voted merely because the voter placed the provisional ballot envelope directly into the ballot box. Tr. Vol. 5, 1146:2-18 (Testimony of Karen Martin). The evidence showed that the overwhelming majority of claimed illegal provisional ballot votes are ballots that were cast by qualified, registered voters, and the outcome of this election should not be determined by throwing out the ballots of qualified, registered voters.
- 9. Even if the Court were to find the misfed provisionals from registered voters were illegal and use proportionate deduction, however, the result is the same. Provisional ballots are intended to be cast by voters outside the county or precinct where that voter resides, and so the precinct in which the vote was cast does not reveal anything about the voting preference or demographics of the particular voter unless registered in the precinct.

Because the voters of this State voted for Governor Gregoire and Mr. Rossi in virtually identical numbers, the Court finds that, in the absence of information about the particular voter who cast a provisional ballot, there is no basis – even under a proportionate reduction theory – for believing such a ballot was voted for any particular candidate or even any candidate at all in the Governor's race. In the absence of such information, the Court finds that such a ballot is the same as a lawful vote and had no effect on the outcome of the race.

- 10. The other polling place discrepancies alleged by Petitioners in King County do not prove any improperly counted ballots. During the canvass and in the course of this litigation, King County worked to resolve discrepancies in the reconciliation of votes cast at its 540 poll sites. The testimony indicated that such discrepancies are not unusual in any county. In the course of that work, King County produced a spreadsheet which was admitted as Trial Exhibit 36. This spreadsheet indicates that because the label from the provisional ballot envelope had not been transferred to another document, *see* Tr. Vol. 7, 1437:10-1438:4 (Testimony of Dean Logan); TX 8013 (provisional ballot envelope), an additional 437 provisional ballots might have been cast directly into the poll site tabulators. Tr. Vol. 2, 374:16-375:12; 377:19-23 (Testimony of Bill Huennekens). However, the testimony indicated that this list of additional 437 was based on the best "guess work" of the election workers, after the fact, and that there were alternative explanations for the discrepancies noted in King County's records.
- 11. The total of all precinct *positive* discrepancies (more votes tallied in the machines than poll book signatures) was 1,156. Tr. Vol. 7, 1664:2-5 (Testimony of Linda Sanchez). However, the evidence showed that a substantial number of these discrepancies were explained by a factor referred to as cross-over. Every ballot is coded for a particular precinct and, when tabulated, is attributed to that precinct. However, because there are

usually many precincts at a polling place, there are many reasons why a voter might receive a ballot coded for a different precinct than the precinct in which the voter is registered, including poll workers mixing up their stacks of ballots or running out of one precinct's ballots and borrowing from another. The Court notes that such discrepancies were not unique to King County but are of a nature that would happen anywhere and in any election. *E.g.*, Tr. Vol. 5, 1117:13-1119:7 (Testimony of Anne LaCour, Island County Auditor). For example, person registered in one precinct at a polling place might sign her name in the poll book at the correct precinct (and get credited with voting in that precinct, causing a negative discrepancy in that precinct), but be given and vote a ballot from another precinct at the same polling place (causing a positive discrepancy there). Tr. Vol. 2, 294:1-8 (Testimony of Evelyn Arnold, Chelan County Auditor); Tr. Vol. 5, 1141:11-1142:7, 1144:14-1445:1 (Testimony of Kristina Swanson, Cowlitz County Auditor); Tr. Vol. 2, 412:19-25, 435:2-20 (Testimony of Bill Huennekens) It would be misleading to consider the sum of the positive discrepancies without taking into account the negative discrepancies. Tr. Vol. 5, 1141:11-1142:7, 1144:14-1445:1 (Swanson).

12. At trial, Petitioners asserted that the spreadsheet mentioned above supported a claim that there were 1,156 more votes than voters at the polls. However, these ballots and the names of those who may have cast them were never disclosed in accordance with the Court's pretrial order or the requirements of RCW 29A.68.100, which provides that "[n]o testimony may be received as to any illegal votes unless the party contesting the election delivers to the opposite party, at least three days before trial, a written list of the number of illegal votes and *by whom given*, that the contesting party intends to prove at trial." (Emphasis added). Petitioners' pretrial disclosure of April 15 disclosed only 317 of the

1,156 allegedly illegal votes, and these were voters in King County's list of 348 misfed provisional ballots.

- 13. Petitioners did not present sufficient evidence to support a finding of more than 352 misfed provisional ballots in King County, of which 252 came from registered voters that had not cast another ballot. Petitioners' claim regarding "improperly cast" provisional ballots counted by King County rested on faulty assumptions and inferences based on inadmissible hearsay, accounting discrepancies, and crediting discrepancies. Without direct evidence, Petitioners relied on second, third, and sometimes fourth-hand summaries prepared weeks after the fact. This evidence did not amount to the necessary evidence that any of the votes were improperly counted for either of the candidates involved in this election contest.
- 14. WSDCC also proved that election official errors were made in King County, which erred in not counting lawful votes in three different categories: (a) four provisional ballots labeled "research needed" because King County could not find the registration record for these voters; (b) 47 absentee ballots referred to as "no signature on file" (NSOF) ballots because King County lost or misplaced the registration records for these voters; and six provisional ballots not counted because King County election officials erred in failing to forward the ballots of these individuals to the counties to which King County knew that these voters had moved.² The voters whose lawful votes were not counted by King County are identified in Exhibit B.

² The Court heard testimony that Spokane County counted five provisional ballots for which it had no signature on file, and that Stevens County forwarded provisional ballots to the counties to which it knew such voters had moved. Tr. Vol. 5, 1108:2-19 (Testimony of Vicky Dalton, Spokane County Auditor); Tr. Vol. 5, Tr. 1134:22-1135:3 (Testimony of Tim Gray, Stevens County Auditor).

B. Petitioners' Claims Regarding Absentee Crediting

database to the precinct by precinct manual recount results indicates that the number of registered voters who received credit for casting an absentee ballot is less than the number of absentee ballots that were tabulated. It appears that, following the manual recount, 565,014 absentee ballots were tabulated by King County and that King County's DIMS voter registration database reflects only 564,206 voters whose histories had, as of early January, been credited with voting an absentee ballot. Tr. Vol. 3, 682:5-24 (Testimony of Clark Bensen).³ This would appear to indicate a discrepancy between credits and ballots of 808. *Id.* 682:25-3. However, the parties agree that 320 of the absentee ballots counted by King County are either federal write-in ballots (251 ballots) or address confidentiality ballots (69 ballots). *Id.* 682:5-10. Voters casting such ballots do not appear in the DIMS database and thus no credit will be found in that database related to their ballots. After accounting for these 320 ballots, there remains an apparent discrepancy of 488 between credited voter histories and ballots tabulated.

16. Petitioners contend that the absentee ballot credit discrepancy should be increased by 292 because, they assert, 292 of the credits in the database relate to absentee

³ The Court has admitted the testimony of Clark Bensen as to this subject solely as it relates to the representation by Petitioners' counsel that Mr. Bensen's testimony would be strictly limited to numbers present on a set of diskettes obtained from King County. Counsel stated that Mr. Bensen is "going to express no opinion other than this data set from King County has this number in it. [He's] not going to tell you what the data set means. [He's] going to say what the numbers are on the data set." Tr. 675:23-676:5. To the extent that Mr. Bensen's testimony went beyond testifying as a lay witness as to what the numbers are on the data set, the testimony is stricken. As the Court noted during trial, this "witness is just walking a very fine line between a lay witness and an expert witness. The saying is trying to lick honey from the edge of a razor blade, I think." Tr. Vol. 3, 677:3-6.

ballots rejected post-validation because they were from the wrong election or were multiple ballots. However, it appears from the undisputed testimony of Nicole Way that such ballots are challenged at the time of opening and do not result in any credit being issued to a voter. Nicole Way Dep. 50:8-51:22. The Court finds that the apparent 488 ballot credit discrepancy should not be increased by 292 as Petitioners contend.

- 17. The Court has previously ruled that voter crediting is a post-election administrative exercise that does not bear on the authenticity of the election. Petitioners contend that absentee voter crediting is not merely an administrative exercise because the crediting of absentees during canvassing is a safeguard that prevents a voter from casting both an absentee ballot and a provisional ballot. That safeguard is implemented in King and other counties that use the DIMS system by means of return date codes for absentee ballots rather than "crediting."
- 18. King County does not process any provisional ballot received from a voter who has returned an absentee ballot. In addition, King County postpones the processing of any provisional ballot received from a voter who has been issued an absentee ballot until the time has passed for absentee ballots to be returned. Carlos Webb Dep. 237-38; *see also* Tr. Vol. 6, 1370:3-19 (Testimony of Bob Terwilliger, regarding Snohomish County's procedures with DIMS). Voter registration histories are automatically flagged by the system when absentee ballots are issued to a voter and when a ballot is returned by the voter. Crediting of absentee voter registration histories in King County plays no part in the prevention of double voting and is, in that county and several others, a post-election administrative exercise that does not bear on the authenticity of the election. After the conclusion of the election, voting histories are updated based upon the information in the DIMS system regarding whether an absentee ballot was returned and whether there are any

challenge codes associated with the ballot. Garth Fell Dep. at 209:1-5. Prior to that time, the status of their absentee ballots were indicated by other data in the database which data is eventually used to determine whether to credit the voter's history. The disposition of challenge codes is recorded on the absentee ballot outer envelope and the challenge codes in the DIMS computer system are then manually removed from the associated absentee ballot's record. Because voter history records are subsequently credited by a computer program that checks for the absence of challenge codes, a voter whose ballot is eventually properly counted may not be credited with voting in the county's voter registration database due to human error in failing to remove all challenge codes from the computer system as they are cleared.

- 19. Thus, an apparent discrepancy between absentee ballots tabulated and absentee voter histories credited does not indicate that any double voting or unauthorized voting has occurred. At numerous points in the processing of absentee ballots in a DIMS system, challenge flags or codes are entered which, unless removed, will prevent a voter history from being credited. An absentee ballot that has been held up to resolve a challenge code can be cleared and counted but, due to operator error, the challenge codes may not be fully removed. The result is an excess of valid ballots counted over credits. Tr. Vol. 6, 1351:8-1352:7 (Testimony of Bob Terwilliger). Petitioners have not offered any evidence beyond the mere presence of a credit discrepancy to show that an apparent discrepancy of 583 between absentee ballots counted and absentee voters credited, out of more than 565,000 ballots counted, is anything other than inadvertent error.
- 20. The Court finds that Petitioners did not establish that 583 (or, as Petitioners' trial brief alleged, 875) illegal absentee ballots were counted. Likewise, Petitioners have not

established election official error in the processing of absentee ballots in King County that materially changed the result of the 2004 gubernatorial election.

C. Findings Regarding Expert Testimony and the Application of Proportionate Deduction

- 21. The Court finds that the data on which Petitioners' experts, Professors Gill and Katz, relied was not a complete census of illegal votes, nor was it a random or scientific sample of illegal votes within the State of Washington. In particular, Petitioners' data was overly weighted to include allegedly illegal votes from King County, particularly in precincts in which Governor Gregoire prevailed. This is not consistent with generally accepted scientific standards, and there was no proof that illegal voting by felons or others was more likely to occur in King County than any other county, in light of the distribution of felons around the State. Relying on any party's selection of illegal voters, when it is clear that there are many more that could have been identified, creates the risk that the Court might make an erroneous determination that someone other than the certified winner of the election received the most lawful votes in the State, and risks substituting the Court and the litigation process for the will of the people and the election process.
- 22. The Court finds that the statistical methods used in the reports of Professors Gill and Katz depend on an assumption that determines the outcome they obtain. In particular, they depend on the assumption, without any collateral indication of validity, that illegal voters in a precinct vote for a candidate with a probability equal to the overall distribution of votes in the precinct among candidates.
- 23. Petitioners failed to support that assumption with proof, and the Court finds that the assumption relied upon by Professors Gill and Katz has not been generally accepted in their field of science. The "principle of insufficient reason" was not shown to be

scientifically accepted as a substitute for evidence or other scientific proof in these circumstances. While it can be speculated that illegal voters might tend to vote like their precincts, there is no certainty of that, and the level of uncertainty is unacceptable when the Court is faced with the possibility of overturning a certified election.

- 24. The Court finds that the method of proportionate deduction and the assumption relied upon by Professors Gill and Katz are a scientifically unaccepted use of the method of ecological inference. In particular, Professors Gill and Katz committed what is referred to as the "ecological fallacy" in making inferences about a particular individual's voting behavior using only information about the average behavior of groups (in this case, voters assigned to particular precincts). The ecological fallacy leads to erroneous, misleading results. Petitioners' attempts to recast their experts as employing something other than ecological inference do not remove the "ecological fallacy" from their opinions.
- 25. Election results vary significantly from one similar precinct to another, from one election to another in the same precinct, and among different candidates of the same party in the same precinct. Felons and others who vote illegally are not necessarily the same as others in the precinct.
- 26. The only voters who testified at trial gave credible testimony that they voted for Rossi or Bennett, yet the proportionate reduction method advocated by Petitioners and their experts would have partially deducted these votes from Governor Gregoire's total because these individuals lived in Gregoire-leaning precincts.
- 27. The Court finds that the statistical methods used in the reports of Professors Gill and Katz ignore other significant factors in determining how a person is likely to vote. In this case, in light of the candidates, gender likely was a significant factor. The illegal voters were disproportionately male, and less likely to have voted for the female candidate.

- 28. The Court finds that Petitioners' experts did not establish with sufficient certainty that illegal votes or election official errors changed the outcome of the election.
- 29. The Court finds that Petitioners did not offer credible evidence that more illegal votes were cast for Governor Gregoire than were cast for Mr. Rossi and accordingly Petitioners have failed to make even a prima facie case of election contest based on illegal votes.
- 30. The Court finds that Petitioners did not offer credible evidence that election official errors caused Governor Gregoire to be issued a certificate of election when she did not have the highest number of lawful votes
- 31. The Court finds that Governor Gregoire's certificate of election was not issued irregularly or in error. The Court finds that Governor Gregoire was duly elected and certified as Governor of the State of Washington.

II. CONCLUSIONS OF LAW

1. According to the Washington Supreme Court: "Election contests are governed by several general principles. Chief among them is the principle, long followed by this court, that the judiciary should 'exercise restraint in interfering with the elective process which is reserved to the people in the state constitution.' Unless an election is clearly invalid, 'when the people have spoken, their verdict should not be disturbed by the courts ' In adhering to this principle of judicial restraint, this court has adopted the rule that an 'informality or irregularity' in an election which did not affect the result is not sufficient to invalidate the election. Statutory provisions relating to conduct of an election, such as

requirements for notice, have been held to be directory only, and even though not followed precisely, will not render an election void."⁴

- 2. Petitioners filed this election contest, and they bear the burden of proof. Their burden of proof is to prove by clear and convincing evidence that illegal votes and election official error materially changed the result in the gubernatorial election.⁵
- 3. Petitioners also bear the burden of establishing that the election of Christine Gregoire as Governor was clearly invalid.⁶
- 4. The clear and convincing standard reflects the extraordinary nature of relief that Petitioners seek to unseat a sitting Governor.⁷
- 5. Petitioners have not met their burden. They have not satisfied even the lower standard of preponderance of the evidence.⁸
- 6. It is not enough to show that an error occurred. It is not enough to show that 129 or more errors occurred or that 129 or more illegal votes were cast.

⁴ Dumas v. Gagner, 137 Wn.2d 268, 283 (1999) (internal citations omitted).

⁵ See RCW 29A.68.070; RCW 29.68.110; see also RCW 29A.08.820 (To invalidate voter registration, challenger must prove "by clear and convincing evidence that the challenged voter's registration is improper.").

 $^{^6}$ Dumas, 137 Wn.2d at 283; see also In re Contested Election of Schoessler, 140 Wn.2d 368, 383 (2000) (same).

⁷ *Dumas*, 137 Wn.2d at 283; *Hill v. Howell*, 70 Wash. 603, 613 (1912) ("'An election honestly conducted under the forms of law ought generally to stand[.]'") (internal citation omitted).

⁸ Even if they had met their burden, they would not be entitled to the remedy they sought in the Petition, an order "directing that a new election be conducted as soon as practicable." The Washington Constitution, Article III, § 10, does not permit this Court to order a new election for governor this year, because no such election may be held until the next "general election."

- 7. Election officials and the certificate of election are entitled to a presumption of regularity. Petitioners failed to rebut that presumption.⁹
- 8. As to Petitioners' claims of illegal votes under RCW 29A.68.110, Petitioners failed to prove that an amount of illegal votes was given to Governor Gregoire that, if taken from her, would reduce the number of Governor Gregoire's legal votes below the number of votes given to Dino Rossi, after deducting from Rossi's total the number of illegal votes that were given to him.
- 9. As to Petitioners' claims of election official error under RCW 29A.68.070, Petitioners failed to prove that any election official error was sufficient as to procure Governor Gregoire to be declared duly elected. It is not election official error to fail to intercept every mistake that can happen in the process.
- 10. Petitioners did not allege or prove that any candidate or party procured or participated in any mistaken act by election officials. Thus, under *Hill*, 70 Wash. at 613, the Court finds that the votes must not be charged against either party.
- 11. Petitioners' expert testimony, offered by Professors Anthony M. Gill and Jonathan N. Katz, failed to meet the standard of generally accepted scientific evidence required by *Frye*, and so is inadmissible. Both Professors Gill's and Katz's testimony was based on an assumption of "homogeneity" among voters from the same precinct—an assumption that the illegal and legal voters from the same precinct voted in identical

⁹ *Quigley v. Phelps*, 74 Wash. 73, 77 (1913) ("Every presumption is in favor of the faithful performance of official duty."); RCW 29A.08.810 (voter registration constitutes presumptive evidence of ability to vote).

 $^{^{10}}$ State v. Cauthron, 120 Wn.2d 879, 887 (1993) (citing Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)).

proportions. Petitioners failed to demonstrate that this assumption has been generally accepted in the scientific community, and they failed to introduce any evidence in support of the assumption.

- 12. Petitioners' expert testimony further failed to meet the standard of ER 702 because it was not helpful to the Court, and is inadmissible on those grounds as well.¹¹ The homogeneity assumption Petitioners' experts made was not tested by Professors Gill or Katz for reliability. Similarly, Petitioners provided Professors Gill and Katz an incomplete and non-representative sample of illegal votes, heavily weighted toward King County, in which Governor Gregoire prevailed. Because the sample examined was incomplete and biased, the expert testimony was even more unreliable and therefore unhelpful to the Court.¹²
- 13. The circumstantial evidence on which Petitioners relied was insufficient to prove, by clear and convincing evidence, for which candidate illegal voters voted in the 2004 gubernatorial election. Under Washington law, in the absence of timely and substantiated allegations of fraud, an election contestant must prove for which candidate illegal voters voted in order to carry their burden of proof, and Petitioners failed to do so here. 13
- 14. The Election Contest Petition did not allege fraud, which must be pled with particularity under CR 9(b).¹⁴ The allegations made for the first time in Petitioners' trial

¹¹ ER 702; State v. Kalakosky, 121 Wn.2d 525, 541 (1993).

¹² State v. Huynh, 49 Wn. App. 192, 196 (1987).

¹³ *Hill*, 70 Wash. at 612.

¹⁴ Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 165 (1987) ("To determine whether allegations of fraud satisfy CR 9(b), the court will consider only the complaint, and not additional allegations made in the briefs.").

brief filed one court day before trial began are not sufficient to satisfy CR 9(b),¹⁵ and the Court notes that Petitioners did not specifically allege fraud in any of their earlier (and numerous) briefs filed with the Court in this case.

- 15. Petitioners' claim of fraud on the eve of trial was untimely, a violation of CR 9(b),¹⁶ and precluded by the election contest statute, which requires that an election contestant "set forth specifically . . . [t]he particular causes of the contest" "no later than ten days following the issuance of a certificate of election." RCW 29A.68.030. The statute of limitations for election challenges is clear and unyielding.¹⁷ Adding a new claim beyond the statute of limitations is the functional equivalent of bringing a time-barred election challenge. Both frustrate the public goal of finality of elections.
- 16. The Court nonetheless allowed Petitioners to present their evidence on this claim. The Court concludes that, even if Petitioners' allegation of fraud had been timely and

¹⁵ The Trial Brief stated at page 28 that "[t]here is ample evidence of fraud, and of the opportunity for fraud." Similarly, Petitioners' opening statement, which of course is not evidence, repeatedly alleged fraud. Tr. 7:16-18 ("This is a case of election fraud by the upper management of the King County elections."); Tr. 32:18-19 ("outright fraud by high-ranking King County elections officials").

¹⁶ Civil Rule 9(b) "ensures that plaintiffs seek redress for a wrong rather than use lawsuits as pretexts to discover unknown wrongs." *Haberman*, 109 Wn.2d at 165. To satisfy the heightened pleading requirements under Washington law, the circumstances of fraud should include the time, the place, the substance of the false representations, the facts misrepresented, and the identification of what was procured by the fraud. *Id.* ("A complaint adequately alleges fraud if it informs the defendant of who did what, and describes the fraudulent conduct and mechanisms."). "The complaining party must plead both the elements and circumstances of fraudulent conduct." *Id.* Petitioners clearly failed to satisfy the dictates of CR 9(b) in this case.

¹⁷ Becker v. County of Pierce, 126 Wn.2d 11, 19 (1995) (noting that election contests are governed by "strict" time limits); *Reid v. Dalton*, 124 Wn. App. 113, 122 (2004) (dismissing election contest based on the "bright-line time limitation of elections challenges"). An election contest filed outside the ten-day statute of limitations is untimely and should be dismissed. *See Becker*, 126 Wn.2d at 22.

specifically made, as required by Washington law, the evidence at trial did not show that any fraud occurred. The Court rejects Petitioners' argument that "this case is the *Foulkes* case except on a much larger scale." Tr. 15:22. The facts of *Foulkes v. Hays*, 85 Wn.2d 629 (1975), are clearly distinguishable. In *Foulkes*, ballots were "locked in canvas bags with the key to each bag to the outside, and the bags were stored in a vault at the county auditor's office." *Id.* at 631. Because the "keys to the padlocked sacks of ballots were accessible" and, more importantly, because of evidence that "ballots had been altered between the time of the original tally and the recount," *id.*, the Washington Supreme Court upheld the setting aside of the results of the election at issue in *Foulkes*.

- 17. In this case, there was no evidence that any ballots were altered, and, despite intimations by Petitioners of ballot box stuffing and the disappearance of other ballots, no such acts were shown to have occurred.
- 18. *Foulkes* was not simply a case of the "opportunity" for fraud, but was a case in which ballots in fact were fraudulently altered. "Fraud is never presumed." The burden, which rests squarely on the party alleging fraud, requires clear, cogent and convincing evidence by the accuser to prove all the elements of fraud. Petitioners failed to do so here.
- 19. In this contest, which is based on allegations of illegal votes and election official error, Petitioners were required to prove who received the highest number of illegal votes. RCW 29A.68.050, .070, .110. Petitioners failed to do so.

¹⁸ Crandall v. Lee, 89 Wash. 115, 121 (1916); see also Pedersen v. Bibioff, 64 Wn. App. 710, 722 (1992).

¹⁹ Tokarz v. Frontier Fed. Sav. & Loan Ass'n, 33 Wn. App. 456, 463 (1982).

20. RCW 29A.68.011 does not grant the Court power to base relief only on a
showing that the number of illegal votes exceeds the margin of victory. Election contests as
to the office of Governor rest solely on, and are limited by, the rights conferred by the
Legislature under statute. ²⁰ Neither RCW 29A.68.011 nor any other Washington election
contest statute provides for the exercise of judicial power when the contestant has failed to
show that he has received more legal votes than the certified winner of the election. The
exercise of judicial power absent such a showing has only been exercised in local elections,
where the contestant has shown fraud, and neither of those circumstances is present here. ²¹

21. The Election Contest Petition is hereby dismissed with prejudic

DATED this	day o	of June.	2005

JOHN E. BRIDGES CHELAN COUNTY SUPERIOR COURT JUDGE

Presented by:

 $^{^{20}}$ Becker, 126 Wn.2d at 18 ("Early this century we clearly established that the right to contest an election 'rests solely upon, and is limited by, the provisions of the statute relative thereto.") (internal citations omitted).

²¹ See Foulkes, 85 Wn.2d at 634.

PERKINS COIE LLP

By /s/ Kevin J. Hamilton

Kevin J. Hamilton, WSBA # 15648 David J. Burman, WSBA # 10611 William C. Rava, WSBA # 29948 1201 Third Avenue, Suite 4800 Seattle, WA 98101-3099

Attorneys for Intervenor-Respondent Washington State Democratic Central Committee

SPEIDEL LAW FIRM

Russell J. Speidel, WSBA # 12838 7 North Wenatchee Avenue, Suite 600 Wenatchee, WA 98807

JENNY A. DURKAN

Jenny A. Durkan, WSBA # 15751 c/o Perkins Coie LLP 1201 Third Avenue, Suite 4800 Seattle, WA 98101-3099